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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 590

AMERICAN PIPE & STEEL CORPORATION, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, American Pipe and Steel Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on April 17, 1957.

OPINIONS BELOW

The Findings of Fact and Opinion of the Tax Court are reported at 25 T.C. 351. The opinion of the Court of Appeals for the Ninth Circuit, printed as Appendix A, *infra,* is reported at 243 F. 2d 125.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 17, 1957 (Appendix B, *infra*). Rehearing was denied June 4, 1957 (Appendix C, *infra*). On August 29, 1957, Mr. Justice Black extended the time for filing the petition for a writ of certiorari to and including November 1, 1957 (Appendix D, *infra*).

QUESTIONS PRESENTED

(1) Does the Tax Court comply with the statutory requirement that it must make findings of fact, where its purported findings consist of nothing more than a partial recital of the evidence and a conclusion that "the evidence does not establish that respondent [the Commissioner] erred"?

(2) May a Court of Appeals, on petition to review a decision of the Tax Court, search the record and make the findings of fact necessary to support the conclusion of the Tax Court, where the Tax Court has failed to make proper findings of fact?

(3) Where the petitioner has adduced competent and relevant evidence to support his position, may the Tax Court rule against the petitioner on the ground that Petitioner's proof does not overcome the *determination* of the Commissioner?

STATUTES INVOLVED

Section 129 of the Internal Revenue Code of 1939, as amended, 26 U.S.C. (1952 ed.) § 129, provides in relevant part as follows:

> (a) *Disallowance of Deduction, Credit, or Allowance.*—If (1) any person or persons acquire,

on or after October 8, 1940, directly or indirectly, control of a corporation, or (2) any corporation acquires, on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately prior to such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation, and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income or excess profits tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For the purposes of clause (1) and (2), control means the ownership of stock possessing at least 50 per centum of the total combined voting power of all classes of stock entitled to vote or at least 50 per centum of the total value of shares of all classes of stock of the corporation.

Section 1117 of the Internal Revenue Code of 1939, as amended, 26 U.S.C. (1952 ed.) § 1117, provides in relevant part as follows:

(a) *Requirement.* A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made by a judge in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) *Inclusion of findings of fact or opinions in report.* It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report

in writing all its findings of fact, opinions and memorandum opinions.

Section 1141 of the Internal Revenue Code of 1939, as amended, 26 U.S.C. (1952 ed.) § 1141 provides in relevant part as follows:

> (a) *Jurisdiction.* The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.

Rule 32 of the Rules of Practice of the Tax Court of the United States, 26 U.S.C.A. (IRC 1954) § 7453 provides as follows:

> *Burden of proof.* The burden of proof shall be upon the petitioner, except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent.

STATEMENT

A. The Case

Petitioner, American Pipe & Steel Corporation (hereinafter referred to as American Pipe) is a corporation organized under the laws of Nevada and maintaining its principal place of business in Alhambra, California. In 1943, petitioner acquired the capital stock of a California corporation, Palos Verdes Estates, Inc., and in the years 1943, 1944, 1945

and 1946 filed consolidated income tax returns (T. 51-52, 60).[1]

The Commissioner of Internal Revenue determined a deficiency of $213,775 in the taxes paid under the consolidated returns for the years 1944, 1945 and 1946 by disallowing the tax benefits which inured to petitioner as a result of filing the consolidated returns. This disallowance was based upon the Commissioner's determination that the principal purpose motivating petitioner's acquisition of Palos Verdes Estates, Inc. was the evasion or avoidance of federal income or excess profit taxes, within the meaning of Section 129 of the Internal Revenue Code of 1939 (T. 28-43).[2]

Petitioner filed a petition for redetermination of the deficiency with the Tax Court (T. 7-27), and on February 28, 1956, the Tax Court sustained the Commissioner's determination (T. 49-79). The Tax Court made no express finding that the principal purpose of American Pipe's acquisition of Palos Verdes was the evasion or avoidance of income or excess profits taxes. Instead, after setting out some of the evidence introduced at the trial it concluded:

> "On the basis of the foregoing facts, we arrive at the ultimate conclusion that *the evidence does*

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[1] References to the Transcript of Record used in the court below and accompanying this petition are designated by "T." followed by the page number. References to the Appendix to this Petition are designated by referring to the pages thereof, which are distinguished by an "a".

[2] The Commissioner also determined that the consolidated returns were not within the purview of Section 141 of the Internal Revenue Code of 1939 (T. 31). By stipulation, however, the parties agreed that the sole issue to be determined was the applicability of Section 129 (T. 84), which was the only issue decided by the Tax Court and by the Court of Appeals.

> *not establish that respondent erred* in holding that the evasion or avoidance of income or excess profits taxes by securing the benefits of deductions, credits or other allowances which it would not otherwise enjoy was the principal purpose for which American Pipe acquired the capital stock of Palos Verdes." (T. 75) (Emphasis added).

Petitioner thereafter filed a petition for review in the Court of Appeals for the Ninth Circuit (T. 647 et seq.). The Court of Appeals rejected petitioner's attack on the Tax Court's decision. It held that the Tax Court's conclusion, quoted above, was not a finding that the presumption of correctness attaching to the Commissioner's determination had not been overcome; but was rather "an express finding of failure of proof, which, if substantially supported by the evidence requires an affirmance . . ." (3a-4a). The Court of Appeals thereupon examined the record, ignoring for all practical purposes the "findings of fact" made by the Tax Court and set out its own view of the evidence which, though not designated as such, constituted findings of fact of its own. Although plainly relying upon its view of the evidence as so set out in its opinion, rather than upon the "findings" of the Tax Court, the Court of Appeals concluded that the "findings of the Tax Court are supported by substantial evidence", and affirmed the decision (6a).

B. The Facts

In order that this Court may properly assess the questions presented in this case, it is necessary to set out a detailed statement of the facts. Many of these facts were stipulated and few, if any, are in dispute.

American Pipe was organized under the laws of Nevada in 1929, but has maintained its principal place of business in Alhambra, California, a suburb of Los Angeles (T. 51). It has been principally engaged in the steel fabricating business, manufacturing more than 500 different products, including pipe and different types of tanks, as well as products from aluminium and other alloys (T. 55).

The stock control of American Pipe, at all times material to these proceedings, rested in Jack Lane and W. G. Krieger who together held approximately 96% of outstanding shares. For the period in question, Lane was President of American Pipe and Krieger was Secretary or Treasurer (T. 54). Lane not only had substantial experience as an employee and officer of American Pipe, but in addition had an extensive background in many phases of the local real estate business, including the development of tracts, and the management and sale of properties. He had long been familiar with real estate in and around Palos Verdes, California, where he had opened a real estate office after he had acquired a real estate broker's license in 1937 (T. 54-55).

Palos Verdes Estates, Inc. (hereinafter referred to as Palos Verdes) was a corporation formed under the laws of California in 1935 by certain parties in interest to receivership litigation in the California courts. Palos Verdes was in the nature of a corporate reorganization of interests theretofore existing in a large residential project in the Palos Verdes area—a suburb of Los Angeles—which had been plagued by financial difficulties almost from its inception in 1920 (T. 51, 53-54, 85 et seq.).

The connection between American Pipe and Palos Verdes arose as the result of the activities in 1942 of Robert P. Archer, who described himself as "a promoter" (T. 239). Archer had considerable experience in the securities business and in several facets of the real estate business in and around Los Angeles (T. 56, 119-127). He was acquainted with Ben Haggott (T. 58), who had become president of Palos Verdes in 1938 (T. 585), and was also fully aware of Palos Verdes' distressed financial position (T. 586). Archer was close to being "broke" at that time (T. 57) and had no particular business or employment, and he was "searching for something in a business deal or a job or something to get into to get myself a little income" (T. 134). As he explained: "I didn't have too much working capital to go into anything that would be worthwhile, although I realized that my experience in buying building and loan certificates was not too dissimilar from what it would take to buy the preferred stock of a reorganized corporation, and a lot of money had been made in this area on foreclosed real estate bonds, reorganizations—I was real estate-minded . . ." (T. 131).

Archer conceived the plan of acquiring as much of the stock of Palos Verdes as he could and thereafter of seeking to eliminate the state tax assessments on the lots by legal action (T. 131-136). Suits to invalidate tax assessments had apparently become somewhat of a common practice in the area (T. 132-133, 453). Palos Verdes had approximately 700 lots, and if the envisioned legal action were successful, titles to them could be cleared for approximately $80,000 (T. 133-134, 160). It was estimated that even a quick sale of the lots thereafter could bring at least $350,000

(T. 161). He realized that it would be difficult to obtain 100% of the outstanding stock, but he expected that he could obtain at least 70% of the stock, and then by the device of levying an assessment, force the forfeiture or sale of the remainder (T. 58, 135-136, 153, 232 et seq.).

In mid-1942, when Archer was developing his plan to acquire Palos Verdes, American Pipe was negotiating for a substantial defense contract for the manufacture of forge welded containers for lethal gas for use by the Chemical Warfare Service (T. 55-56, 356 et seq.). Archer and Lane had known each other since 1930 or 1931 and had been associated together in real estate ventures in 1937 or 1938 (T. 56, 61). Archer also knew the principal chemical warfare officer in the Los Angeles area (T. 137, 172-173). On or about July 29, 1942, Lane suggested that Archer join the American pipe organization. Archer wanted American Pipe's assistance in financing the acquisition of Palos Verdes. It was agreed that American Pipe would lend Archer $2,500 for the purchase of the Palos Verdes stock, and Archer agreed to accept a position with American Pipe (T. 56).

On August 12, 1942, Archer entered the employ of American Pipe for $100.00 per week as an "expediter" (T. 56), with the further understanding that he would have the necessary free time for the Palos Verdes venture (T. 138-139, 254). On September 3, 1942, American Pipe received a contract from the Chemical Warfare Service to produce 25,000 containers for $3,500.000 (T. 55-56).

Archer went forward with his plans to acquire Palos Verdes. On August 18, 1942, he made an offer

to the shareholders to purchase their shares, with a right to cancel if he could not purchase 70% (T. 57-58). His efforts were successful, and during the next several months he acquired the amount of stock which he sought (T. 59, 156). At a special meeting of the Board of Directors of Palos Verdes on June 23, 1943, a resolution to permit the levying of assessments upon the stock was adopted and on August 26, 1943, an assessment of $40.00 per share was levied (T. 59). In the meantime, Palos Verdes on July 27, 1943 instituted an action to set aside the tax deeds with respect to the lots (T. 58-59). On August 2, 1943, an interlocutory decree was entered setting aside the tax deeds, and restoring the rights of redemption free of interest, penalties and costs, but requiring the payment of the delinquent taxes within six months after the decree became final (T. 59).

Archer, in the meantime, was becoming discouraged as to his ability to raise funds adequate to clear the $80,000 in delinquent taxes. He was concerned because he had already become involved financially with American Pipe in a sizeable sum to acquire the stock; and a small machine shop which he had formed a short time earlier was beginning to develop and demand more of his time (T. 159). Archer, accordingly, talked with Lane and offered to withdraw from the Palos Verdes situation and turn everything he had in the way of stock over to American Pipe in return for cancellation of his financial obligations (T. 263); and to help American Pipe in every way possible in the Palos Verdes deal and also to continue with his work as an expediter (T. 159). On November 25, 1943, the Board of Directors of American Pipe authorized Lane to accept Archer's proposal, which he did (T. 73-74).

American Pipe's Board of Directors had given the Palos Verdes situation careful consideration. When Archer had sought working capital in May of that year, he had sought assistance from American Pipe but had not been given any encouragement (T. 161-2). Lane had shown a personal interest but could not raise the necessary funds. Krieger, Lane's associate in American Pipe, preferred his investments in the oil business (T. 380). Lane, particularly, in the period between May and November, 1943, had examined the Palos Verdes situation extensively (T. 378). He was thoroughly convinced of the profitable possibilities which the lots themselves held, and also felt that such a subsidiary would provide substantial opportunity to American Pipe to enter upon ventures upon which it could not itself conveniently embark (T. 382). That Lane's earlier experience in the real estate field naturally inclined him to this decision is apparent from the projections and analyses he made of the entire matter (T. 407-419).

The sale of the delinquent shares of Palos Verdes was held on December 2, 1943 (T. 59-60), and Archer —now acting for American Pipe (T. 165)—purchased certain remaining shares, and all other shares were declared forfeited in accordance with law (T. 59-60). Archer thereupon delivered all of the shares of Palos Verdes to American Pipe, his indebtedness—which had mounted to $11,248—was cancelled, and American Pipe became the sole shareholder of Palos Verdes (T. 60). Lane was elected president of the subsidiary (T. 18).

In the meantime, all had not gone well with American Pipe's container contract. From the out-

set a variety of production difficulties were encountered, and at the end of September 1943, the contract was in fact cancelled (T. 65-66). It appeared that American Pipe might suffer a loss of as much as $300,000 as a result (T. 66, 374, 389).

The cancellation of this contract, and the emergence of the possibility of a substantial loss to American Pipe, both occurred prior to the time that American Pipe decided to purchase the Palos Verdes stock (T. 60, 66, 420). This fact was of critical significance to any consideration of American Pipe's purpose in making the acquisition, for at the time Palos Verdes was acquired by American Pipe, it did not appear that American Pipe had anything but tax losses (T. 98-99, 374, 389)—and, of course, no tax savings could have been achieved by adding Palos Verdes' losses to American Pipe's losses.

The cancellation of the container contract also had repercussions on Palos Verdes. Under the interlocutory decree, there was only a limited time in which redemption of the lots could be made, but it had become impossible for American Pipe to furnish such funds (T. 405-406). In consequence, the lots were offered in large blocks for sale to contractors and builders (T. 61, 399-400). On December 28, 1943, approximately 450 lots were sold at approximately $40.00 per lot (plus approximately $10,000 in outstanding taxes) to Carl Dahlberg, who had substantial connections in the building field, and was then the vice president of a company which manufactured prefabricated houses; and who—it was believed—could work out some method even under wartime restrictions to commence the construction of homes (T. 61-62, 404-

405, 286-289).[3] The remaining lots were put up for public auction in January of 1944, and most of them were sold for a net of $16,185 after costs of sale (T. 64). Some lots still remaining were sold at private sales, and the remainder of the lots not redeemed or sold were lost under the terms of the Court's final decree, which was entered on May 15, 1944 (T. 64-65).

As a result of these sales, the accounting on the books of Palos Verdes with respect to the lots worked out as follows: (a) those lots sold to Dahlberg in 1943 had a book value of approximately $250,000 and the book loss from the sale amounted therefore to approximately $232,000; (b) the lots sold at public auction in 1944 had a book value of approximately $183,000, and the book loss from the sale amounted therefore to approximately $167,000 (T. 64).

But the actual results of the sale of these lots so far as American Pipe was concerned presented a considerably different picture. Attaching no value to the Dahlberg notes, the sale of lots by Palos Verdes netted $16,185 (T. 64). The cost to American Pipe of the Palos Verdes stock totalled $11,248 (T. 60). Thus, in the space of just a few months, and despite the fact

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[3] Dahlberg was unable to have the wartime restrictions against building lifted, and as a result was unable to procure financial backing (T. 312-314). When the taxes on the lots he purchased became due in early 1944, he borrowed the money from American Pipe (which by that time had received an adjustment on its terminated container contract) and gave his personal interest bearing note to cover the advance (T. 62-63).

Some four years later, in 1948, Dahlberg reconveyed these lots to Lane personally, in a complicated transaction whereby the proceeds of any sales of the lots were required first to be applied to delinquent taxes and penalty assessments, and then to the notes held by American Pipe (T. 63).

that the expectations with regard to these lots had not worked out as planned, American Pipe in practical effect nevertheless made a profit of approximately $5,000 on the transaction. Assuming that American Pipe's acquisition of Palos Verdes was prompted by nothing more than the potential value of the lots,[4] that expectation—despite the difficulties—was in fact justified.

But the benefits to American Pipe from the acquisition of Palos Verdes did not stop with the profitable sale of the Palos Verdes lots. During the years which followed its acquisition by American Pipe, Palos Verdes purchased other real estate including some houses (T. 451). In 1944 and 1945, Palos Verdes built and leased bulk gasoline stations, for which, incidentally, American Pipe supplied the tanks. These transactions were profitable to Palos Verdes, as well as to American Pipe (T. 466-468).

In addition, Palos Verdes went into two oil lease transactions as a joint venturer and oil was brought in making the venture "very" profitable (T. 462-463). In late 1943 or early 1944, Palos Verdes leased an oil refinery which not only turned out to be profitable to Palos Verdes, but also was used to prove out certain

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[4] Other business reasons prompting American's Pipe's acquisition of Palos Verdes were explained in a letter dated November 25, 1943, from Jack Lane to American Pipe's Board of Directors, set out in full in the Tax Court's Findings (T. 67-72). Some of these reasons were that through Palos Verdes, American Pipe could acquire an "in" for the sale of pipe and casing (T. 69-70); could participate in leases on oil properties, thereby facilitating the sale of oil field equipment (T. 70); and could, by providing containers to the purchasers of Palos Verdes houses, enchance the volume of liquified gas container sales (T. 70-71).

new equipment which American Pipe had developed (T. 463-464). Palos Verdes also invested in a boat for charter work to oil companies engaged in exploration of the lands lying off the coast of Southern California (T. 468-469).

Finally, Palos Verdes purchased from American Pipe approximately 1,000 of the lethal gas containers which American Pipe was left with when its chemical warfare contract was cancelled. These containers were sold originally to Palos Verdes for $15,000—approximately double American Pipe's cost. When subsequently the containers could not be used by Palos Verdes for the purposes originally intended, they were converted into dredging pipe, propane tanks and chlorine tanks, and were sold at a profit of approximately $100,000 (T. 74, 472-473).

Moreover, subsequent events also proved the basic soundness of the judgments of Archer and Lane with regard to the value of the Palos Verdes lots. Lane had personally purchased about 200 of these lots in 1947 when the State of California sold them at tax sales, and at the time of the hearing of this case in the Tax Court he owned personally approximately 300 lots (T. 455-456). At wholesale, and from responsible real estate builders who were building in the Palos Verdes area, Lane had been offered approximately $250,000 for these lots, but he had rejected the offers as being too low (T. 456-457).

Subsequent events have thus made it clear that American Pipe's acquisition of Palos Verdes was hardly a quixotic adventure; indeed, they indicated that the reasons originally prompting the acquisition[5]

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[5] See footnote 4, *supra* at p. 14.

were, if anything, rather modest, and that the potential to be realized from the acquisition was even greater than had been envisioned.

REASONS FOR GRANTING THE WRIT

I

It is the statutory duty of the Tax Court to include in its report upon any proceeding the findings of fact upon which its decision and report are grounded. Section 1117 (b) of the Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.) § 1117 (b); *Helvering* v. *Rankin* (1935) 295 U.S. 123; *Timmons* v. *Commissioner of Internal Revenue* (CA 4, 1952) 198 F. 2d 142. Cf. Rule 52(a) *F.R.Civ.P.* The findings constitute the groundwork upon which the entire proceeding rests. If they are absent, the proceeding is without a foundation; and if they are inadequate, the proceeding is on a waivering base.

This Court has observed that the "nature and degree of exactness of the findings required depends on the circumstances of the particular case," *Kelley* v. *Everglades Drainage District* (1943) 319 U.S. 415, 419, but has admonished that they must at least be "sufficient to indicate the factual basis for the ultimate conclusion." *Id.* at 422.

In this case the Tax Court, as the Court of Appeals observed "seems to have incorporated into its findings a review" of the evidence (2a). This characterization is charitable, for even a cursory reading of the findings of the Tax Court will indicate that they fail to fulfill the function required of them. They are, at best, a bald review of the evidence, and an incomplete one at that.

A. *As to their insufficiency.* The findings fail to determine the disputed issues upon which the ultimate conclusion necessarily had to be based. Two examples will suffice.

An important issue in this case is whether Archer, in acquiring the stock of Palos Verdes, was acting for himself or on behalf of American Pipe. The Commissioner contended that he was American Pipe's agent (T. 107-108, 518); petitioner argued that he was acting for himself (T. 93-94). The Tax Court's "findings" indicate only that Archer opened an escrow account in his own name;[6] and that he proceeded to acquire the stock with funds advanced by American Pipe (T. 57). These observations would support either contention, but the critical underlying question is left unanswered.[7]

The findings are equally deficient as to the nature of the sale of the Palos Verdes lots to Dahlberg in December 1943. This is also an important issue because if the Dahlberg sale was not *bona fide* and was really a device to establish a quick tax loss, American Pipe's motive for the acquisition of Palos Verdes would obviously be suspect. Much evidence was offered to indicate that Dahlberg's failure to raise cash for the lots was unforeseen and resulted from factors outside of his control (T. 301, 312, 321-322, 288); and

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[6] This finding is obviously based on the uncontradicted testimony which indicates that the escrow account was in the name of Archer individually, and nothing in the bank records ever indicated that Archer signed or acted as nominee for anyone (T. 638-643).

[7] The Court of Appeals, by contrast, categorically stated that "American Pipe acquired the Palos Verdes stock through a nominee, one Robert P. Archer . . ." (4a).

that at the time the sale was made to him, American Pipe and Palos Verdes had every good reason to believe that he could properly carry out the deal (T. 404-406, 505, 513). But again the "findings" fail to determine the important underlying question. They indicate only that Dahlberg purchased the lots, paying for them by personal note; that the money to pay the back taxes on these lots was advanced by Palos Verdes again for a personal note when Dahlberg was unable to raise the necessary funds himself; that the lots were deeded to Dahlberg by Palos Verdes; that the deed was recorded; and that four years later, Dahlberg reconveyed the lots to Lane personally (T. 62-63). These facts could support either of the two competing contentions: that the sale was merely a device to register a tax loss, or that unforeseen subsequent events caused these unfortunate results. The Tax Court "found" neither.[8]

In thus relying entirely upon a recital or a review of the evidence and failing to select unequivocally from the competing contentions that one which, on the evidence, it considered to be the fact, the Tax Court failed to carry out its statutory fact-finding duty. It violated the well established principle that "findings of fact should be 'a clear and concise statement of the ultimate facts, and not a statement, report, or recapitulation of evidence from which such facts may be found or inferred.' " *Brown Paper Mill Company, Inc.* v. *Irvin* (CA 8, 1943) 134 F. 2d 337, 338 and cases cited; *Hartford-Empire Company* v. *Shawkee Manufacturing Co.* (CA 3, 1944) 147 F. 2d 532, 535.

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[8] The Court of Appeals, by contrast, stated that "the sale to Dahlberg was a mere sham, designed to accomplish a quick sale of the lots to gain the tax benefits" (5a, fn. 5).

Cf. United States v. *Esnault-Pelterie* (1936) 299 U.S. 201.

B. *As to their incompleteness.* The Tax Court failed to make *any* findings on important and material issues as to which evidence was offered. Again, two examples will suffice.

At the trial the Commissioner strenuously sought to prove that efforts were made in 1942 to sell Palos Verdes as an investment "attractive to a defense corporation because of its large invested capital" (T. 590), and that Archer was one of the persons who was trying to do this (T. 108, 178-184, 194-202, 245-252, 590 et seq.). As a reading of the transcript will indicate, the evidence so adduced was quite inconclusive (See particularly T. 592, 181, 194, 252-253). Nevertheless, if true, this fact could be devastating to petitioner; if untrue, it seriously weakened the Commissioner's case. The Tax Court's "findings" or review of the evidence makes absolutely no mention positively or negatively of this line of proof.

Even more striking is the omission from the Tax Court's "findings" of any mention of the many events subsequent to American Pipe's acquisition of Palos Verdes indicating that Palos Verdes was a useful and profitable subsidiary. At the trial, when respondent's counsel questioned the materiality of this line of evidence, and petitioner's counsel explained that he was "endeavoring to show the facts here that this was a legitimate genuine business enterprise in 1943 and that the use of * * * the company since that time, corroborates that view", the court agreed and overruled respondent's objection (T. 465-466). Yet the "findings", or review of the evidence, are singularly

devoid of even a mention of any of these facts: the purchase of other real estate; the acquisition of oil leases; the operation of a refinery; the acquisition of a charter boat for off-shore oil development; and the purchase and subsequent resale of the excess lethal gas containers. See *supra*, pp. 14-15.

C. *As to their inconsistency.* If we are to assume that the "findings" which the Tax Court made are adequate and sufficient, then clearly they are inconsistent in themselves. All of the purported findings deal with or "review" the evidence presented by the petitioner. This evidence is explanatory of the business motivations behind the acquisition of Palos Verdes, and favors rather than controverts petitioner's case. Indeed, there is not much variance between the Tax Court's "findings" and petitioner's petition.

Then comes, at the conclusion, the Court's "ultimate conclusion". Commencing with the explanation "On the basis of the foregoing facts", the Court concludes that petitioner's evidence does not establish that the Commissioner erred (T. 75). This ultimate finding, however, plainly does not derive from the "findings" which preceded it. The ultimate "finding" points East. The earlier "findings" point West. One no more leads to the other than white does to black.

D. *The failure of the ultimate finding.* The Tax Court's decision was determined by its final finding which was:

> "On the basis of the foregoing facts, we arrive at the ultmate conclusion that the evidence does not establish that respondent erred in holding that the evasion or avoidance of income or excess profits taxes by securing the benefits of deductions,

credits or other allowances which it would not otherwise enjoy was the principal purpose for which American Pipe acquired the capital stock of Palos Verdes." (T. 75).

Section 129 of the Internal Revenue Code of 1939 does not authorize the disallowance of benefits where the Commissioner has not erred in making a determination.[9] Section 129 authorizes disallowances only where "the principal purpose . . . is evasion or avoidance . . ." The finding of the former does not constitute a finding of the latter.

So far as counsel can determine, all other Tax Court decisions under Section 129 have contained an express finding as to the issue made determinative by the statute.[10] None have been a finding like the one

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[9] Whether such a finding gives improper weight to the determination of the Commissioner, is discussed *infra*, under III.

[10] See e.g., *Alcorn Wholesale Co.* v. *Commissioner of Internal Revenue* (1951) 16 T.C. 75, 88:

"The King Grocery Company was reorganized into the five petitioner corporations on January 3, 1944, principally for business reasons and not principally to evade or avoid tax."

Berland's Inc. of South Bend v. *Commissioner of Internal Revenue* (1951) 16 T.C. 182, 187:

"The petitioners were not organized principally for the purpose of avoiding Federal income or excess profits tax."

J. E. Dilworth v. *Henslee* (M.D. Tenn 1951) 98 F. Supp. 957, 960:

"The formation of plaintiff's wholly owned subsidiary . . . was not undertaken for the principal purpose of evading or avoiding Federal Income or Excess Profits Taxes."

Chelsea Products, Inc. v. *Commissioner of Internal Revenue* (1951) 16 T.C. 840, 849-850, aff'd. (C.A. 3, 1952) 197 F. 2d 620:

"The principal purpose for the organization of each of the sales companies was to carry on business and not to aid petitioner or the

made here that the petitioner has failed to establish that the respondent erred. And for good reason! This Court has held that "saying that the plaintiff has sustained the burden of proof [or failed to sustain it] as to the designated issue in suit * * * is not an adequate finding of the matters of fact involved in that issue * * *. It is in the nature of a legal conclusion rather than a finding of the underlying facts * * * and is not sufficient to support the judgment which rests on it." *United States* v. *Jefferson Electric Mfg. Co.* (1934) 291 U.S. 386, 408-9. See also *Diller* v. *Commissioner of Internal Revenue* (CA 9, 1937) 91 F. 2d 194; *Anderson* v. *Commissioner of Internal Revenue* (CA 9, 1935) 78 F. 2d 636.

* * * * *

In affirming the decision of the Tax Court, and thereby implicitly holding that the Tax Court's "findings of fact" serve the purpose required of them, the Court of Appeals has obviously decided an important Federal question relating to the administration of the tax laws. It has sustained a method of proceeding, which reaches to the very heart of the decisional process, and which appears to be in conflict with applicable decisions of this Court; *United States* v. *Jefferson Electric Mfg. Co., supra; Kelley* v. *Everglades Drainage Dist., supra; Helvering* v. *Rankin,*

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sales companies in the evasion or avoidance of Federal income or excess profits tax . . ."

See also *Alprosa Watch Corp.* v. *Commissioner of Internal Revenue* (1948) 11 T.C. 240, 243; *Commodores Point Terminal Corp.* v. *Commissioner of Internal Revenue* (1948) 11 T.C. 411, 418-419; *WAGE* v. *Commissioner of Internal Revenue* (1952) 19 T.C. 249, 256. *Cf. Alpha Tank & Sheet Metal Mfg. Co.* v. *United States* (1953) 126 C. Cls. 878, 892.

supra; as well as with the decisions of other courts of appeals; *Brown Paper Mill Company, Inc.* v. *Irvin, supra; Hartford-Empire Company* v. *Shawkee Manufacturing Co., supra;* and, indeed, with its own decisions; *Diller* v. *Commissioner of Internal Revenue, supra; Anderson* v. *Commissioner of Internal Revenue, supra.* It has sanctioned such a departure from the principles applicable to Tax Court proceedings as to call for an exercise of this Court's power of supervision. *Cf. Kelley* v. *Everglades Drainage Dist., supra.*

II

In affirming the decision of the Tax Court, the Court of Appeals not only sanctioned the errors hereinabove described but, indeed, compounded them.

The Court of Appeals apparently concluded that the Commissioner's determination should be sustained, but at the same time recognized that it could not be sustained on the basis of the "findings" of the Tax Court. And so the Court of Appeals indulged in "an examination of the record" (4a) and made "a close scrutiny" (6a) of the evidence to support *its* conclusion. But the examination and scrutiny of the record which it made was not to determine whether the "findings" of the Tax Court were supported by substantial evidence, *cf. Helvering* v. *Rankin,* 295 U.S. at 131, and cases cited; but rather to assist it in making findings of its own.

The following statements, taken from the opinion of the Court of Appeals, are examples of such "findings";

> 1. "the sale to Dahlberg was a mere sham, designed to accomplish a quick sale of the lots to gain the tax benefits" (5a, fn. 5).

2. "American Pipe acquired the Palos Verdes stock through a nominee, one Robert P. Archer, employed by American Pipe" (4a).

3. "any corporation formed to do business in the real estate field would have satisfied the alleged needs of American Pipe" (6a).

4. "within two months of acquisition Palos Verdes was a mere corporate shell" (6a).

We do not concede that these "findings" are supported by substantial evidence. They are, however, the type of findings which should have been made in this case. *But they were made by the Court of Appeals; they were not made by the Tax Court.*[11]

And this is the second vice in the decision below! By taking upon itself the fact-finding function, the Court of Appeals has completely overstepped the bounds of appropriate appellate review and has plainly violated the well-recognized limitation so often stated by this Court:

> "It may be that adequate evidence as to these matters is in the present record. On that we do not pass, for it is not the function of this Court [or any appellate court] to search the record and analyze the evidence in order to supply findings which the trial court failed to make." *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. at 421-22.

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[11] "If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board [citing cases]. And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record." *Helvering* v. *Rankin*, 295 U.S. at 131-32.

In this respect, therefore, the decision below constitutes a flagrant departure from the principles applicable to Courts of Appeals in the discharge of their function on petitions for review of Tax Court proceedings, and calls for the exercise of this Court's power of supervision, *Cf. Kelley* v. *Everglades Drainage Dist., supra; Helvering* v. *Rankin, supra.*

III

It is well established that the Commissioner's determination carries with it a presumption of correctness. *J. M. Perry & Co., Inc.* v. *Commissioner of Internal Revenue,* (CA 9, 1941) 120 F. 2d 123; *Crocker* v. *Commissioner of Internal Revenue,* (CA 7, 1936) 84 F. 2d 64. This presumption of correctness, however, necessarily disappears when the petitioner adduces competent and relevant evidence to support his position. *J. M. Perry & Co., Inc.* v. *Commissioner of Internal Revenue, supra* at 124; *Hemphill Schools Inc.* v. *Commissioner of Internal Revenue,* (CA 9, 1943) 137 F. 2d 961. Where such evidence is presented by petitioner, it then becomes incumbent upon the Commissioner to submit evidence in support of his determination, for at that point he can no longer rely on the presumption of correctness, and resolution of the case must be "wholly on the evidence", *Hemphill Schools Inc.* v. *Commissioner of Internal Revenue, supra; J. M. Perry & Co., Inc.* v. *Commissioner of Internal Revenue, supra.*[12]

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[12] The Congress was obviously troubled over the weight to be accorded the Commissioner's determination in a Section 129 case. In the enactment of the 1954 Internal Revenue Code, the House of Representatives sought to establish a "determinative" presumption under certain conditions. The Senate Finance Committee thought

The burden of proof is an entirely different concept. It places upon one of the parties the obligation to prove his case by a preponderance of the evidence. Since Rule 32, *Rules of the Tax Court of the United States,* places the burden of proof on the petitioner, it is necessary in a Tax Court proceeding for the petitioner to prove his case by a preponderance of the evidence; and if he does not, the Commissioner prevails. But whether the petitioner has carried his burden must be determined by the Tax Court "wholly on the evidence" *Hemphill Schools Inc.* v. *Commissioner of Internal Revenue, supra.* In the Tax Court, "the Commissioner cannot rely upon his determination as evidence of its correctness either directly or as affecting the burden of proof." *J. M. Perry & Co., Inc.* v. *Commissioner of Internal Revenue, supra.*

In short, the important distinction between the burden of proof and the burden of going forward with the evidence is that the former sets the basis for decision, while the latter establishes the procedural rules for submitting evidence at the trial.

The decisions of both courts below reflect confusion with respect to this distinction. The final "finding" of the Tax Court, upon which its decision and judg-

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that the House version imposed too heavy a burden on the taxpayer and substituted the "prima facie evidence rule", which was finally enacted. As some commentators have pointed out, however, the procedure in effect prior to this revision already imposed upon the taxpayer the burden of making out a prima facie case; and raised the question what the new version (i.e., the prima facie evidence rule) accomplished. See *Magill and Kosmian, The Internal Revenue Code of 1954: Income, Deductions, Gains and Losses* (1954) 68 Harv. L. Rev. 201, 218; *Liles,* Section 269 of the 1954 Code: *Acquisitions to Avoid Federal Income Tax* (Oct. 1955) 41 A.B.A.J. 936, 937.

ment were founded, is set out in full at pp. 20-21, *supra*. In essence, it was that "the evidence does not establish that respondent [the Commissioner] erred in holding that evasion or avoidance of income or excess profits taxes . . . was the principal purpose" of the acquisition.

The plain language of this "finding" makes it manifest that the Tax Court in this case weighed the evidence adduced by the petitioner against the *determination* made by the Commissioner. In so doing, the Tax Court apparently proceeded on the assumption that the Commissioner's determination had probative weight and evidentiary value.

The Tax Court stated that "the evidence does not establish that respondent [the Commissioner] erred in holding . . ."; no mention is made of the Commissioner's evidence. Nor is there mention anywhere in the "findings" which precede the Tax Court's ultimate conclusion of any of the facts or evidence produced at the hearing by the Commissioner, upon which reliance was placed.

In the face of this forthright statement by the Tax Court, the Court of Appeals stated that

> "The Tax Court acted upon evidence produced by the petitioner *and the Commissioner* at the hearing, and took no account of the presumption; its findings are based on the evidence produced at the hearing." (2a-3a) (Emphasis added).

The Court of Appeals' assertion that the Tax Court acted upon the evidence produced "by the petitioner *and the Commissioner*" is plainly at variance with the Tax Court's own candid admission. The Court of Ap-

peals cannot, by assertion, make the Tax Court say what it did not say.

In the Tax Court's Opinion (as differentiated from its Findings of Fact and Decision) the Tax Court stated "that petitioner has not successfully carried his burden of proof" (T. 79). And the Court of Appeals, relying upon that statement, explained that the "Tax Court's finding in this respect is an express finding of failure of proof" (3a-4a), rather than a weighing of the evidence against the presumption.

But the Tax Court apparently mistakenly believed that it could properly weigh the presumption attending the Commissioner's determination against the evidence presented by the petitioner. And therefore when the Court of Appeals explained that the "Tax Court's finding . . . is an express finding of failure of proof", it failed to answer the important question: Was it a failure of petitioner's proof as against the *proof* of the Commissioner? Or was it a failure of petitioner's proof against the *determination* of the Commissioner?

The significance to be accorded the Commissioner's determination is a question in every case litigated in the Tax Court of the United States. The obligations and responsibilities of the parties to Tax Court litigation depend upon the answer to this question and, in closely contested cases, this answer can be determinative.

The issue is particularly important in cases arising under Section 129 of the Internal Revenue Code of 1939 (as well as Section 269 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 269) which calls for the exercise of a fine judgment on the question of motive. For it should be noted that this section applies only in

instances where the evasion or avoidance of taxes is the *principal* purpose; it does not apply where tax avoidance is a factor which has been considered, but which is not the principal motivating purpose. *Berland's Inc. of South Bend* v. *Commissioner of Internal Revenue,* 16 T.C. 182, 188; *Alprosa Watch Corp.* v. *Commissioner of Internal Revenue* (1948), 11 T.C. 240, 243.

Moreover, and even more important, Section 129 (and Section 269 of the Internal Revenue Code of 1954) makes the fulcrum for decision the purpose to *evade* or avoid tax, or as the Tax Court explained, places in issue the taxpayer's "state of mind" (T. 79). As we have noted, the petitioner in a Section 129 case has the burden of proof and this burden applies as much to the question of intent to evade as to any other issues which may be in the case. The same issue—the question of intent to evade—is also the common denominator to every civil and criminal tax fraud case, yet in those cases the burden of proof rests on the Government. Section 1112 of the Internal Revenue Code of 1939, 26 U.S.C. (1952 ed.) § 1112. See *Spies* v. *United States* (1943) 317 U.S. 492.

Imposing upon the petitioner the burden of proof with respect to "intent to evade" is an anamoly unjustified in reason or logic. However this may be, the criteria for determining whether the petitioner has discharged his burden certainly should not be permitted to rest in ambiguity. Every effort should be made to free the essential, subtle and delicate issue of intent to evade from the confusion which arises when there is a failure clearly to understand and apply the burden of proof concept in Tax Court cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,174 Apr. 17, 1957

AMERICAN PIPE & STEEL CORPORATION, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Petition to Review a Decision of the Tax Court of the United States.

Before: ORR, FEE, and BARNES, Circuit Judges

ORR, Circuit Judge:

Petitioner is a corporation principally engaged in the steel fabricating business. In 1943 it acquired the capital stock of a corporation known as Palos Verdes Estates, Inc., hereafter Palos Verdes, and that company became a wholly-owned subsidiary of American Pipe. Thereafter, American Pipe and Palos Verdes filed consolidated returns for the years 1943, 1944, 1945, and 1946. The Commissioner of Internal Revenue determined a deficiency in the taxes paid under the consolidated returns for 1944, 1945, and 1946, by disallowance of the claimed tax benefits resulting from the acquisition of control of Palos Verdes. The Commissioner held that the principal purpose of the acquisition was to avoid or evade Federal income and excess profits taxes within the meaning of Section 129 of the Internal Revenue Code of 1939.

American Pipe petitioned the Tax Court for a redetermination of the deficiency. Issues were joined and a hearing

had before the Tax Court, which resulted in the denial by that court of relief to American Pipe. We are called upon to review that decision.

The Tax Court seems to have incorporated into its findings a review of all the evidence introduced at the trial. It ultimately concluded that American Pipe had not met its burden of establishing that the holding by the Commissioner, that evasion or avoidance of income and excess profits taxes by securing the benefit of deductions, credits or other allowances which it would not otherwise enjoy was the principal purpose for which American Pipe acquired ownership of Palos Verdes, was erroneous.[1]

In addition to the finding of failure of proof on the part of American Pipe, the Tax Court in its opinion made the following statement:

> "The Commissioner having determined that the tax benefit to be gained was the principal purpose behind the acquisition, it was petitioner's burden to prove that such determination was erroneous. After a careful study of the record made, we have concluded that petitioner has not successfully carried his burden of proof. We have accordingly so found."

It is contended that the ultimate finding of the Tax Court, together with the quoted statement from its opinion, do not constitute an express and sufficient finding of fact upon which to base the Tax Court's decision. It is the contention of petitioner that the finding of the Tax Court does no more than say that the presumption of correctness which attaches to the determination of the Commissioner still stands in the case, and was not overcome. We do not so read the findings. The presumption necessarily disappeared upon the introduction of evidence. The Tax Court acted upon evidence produced by the petitioner and the Commissioner at the hearing, and took no account of

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[1] The decision of the Tax Court is reported at 25 T.C. 351.

the presumption; its findings are based on the evidence produced at the hearing.

Our attention is directed by petitioner to the case of Hemphill Schools, Inc., v. Commissioner, 9 Cir., 1943, 137 F.2d 961. That case is clearly distinguishable from the instant case. There the court was concerned with a determination by the Commissioner that the taxpayer corporation was availed of for the purpose of preventing the imposition of the surtax upon its shareholders within the meaning of Section 102 of the Internal Revenue Code of 1939. The Tax Court stated in that case:

> "The evidence does not overcome the determination of respondent that petitioner was availed of for the purpose of preventing imposition of surtax upon its shareholders. . . ."

The Tax Court treated the determination of the Commissioner as evidence. No such situation appears here. The evidence adduced at the hearing was the sole consideration of the Tax Court. It found as follows:

> "On the basis of the foregoing facts, we arrive at the ultimate conclusion that the evidence does not establish that respondent erred in holding that the evasion or avoidance of income or excess profits taxes by securing the benefits of deductions, credits or other allowances which it would not otherwise enjoy was the principal purpose for which American Pipe acquired the capital stock of Palos Verdes."

Petitioner, having invoked the jurisdiction of the Tax Court, entered the hearing burdened with the duty of establishing by at least a preponderance of the evidence that the determination made by the Commissioner was erroneous.[2] The Tax Court's finding in this respect is an

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[2] Tax Court Rule 32; Helvering v. Taylor, 1935, 293 U.S. 507; Greenwood v. Commissioner, 9 Cir., 1943, 134 F.2d 915; 9 Mertens, Federal Income Taxation § 50.61-2 (Supp. 1956).

express finding of failure of proof, which, if substantially supported by the evidence requires an affirmance of its decision.[3]

An examination of the record presents this picture:

With the onset of World War II, American Pipe was on the threshold of obtaining many profitable Government war contracts in the metal fabricating field. On September 3, 1942, it received a Government contract amounting to $3,500,000, for the manufacture of gas tanks. Although the contract was later cancelled by the Government in late 1943, the record discloses American Pipe had a backlog of Government prime and subcontracts of $124,603.29 on December 31, 1943, and a total of $1,892,144.92 of Government contracts awarded during 1944. In short, the prospective profits from war contracts loomed large for American Pipe.

Palos Verdes had been in poor financial condition since 1936. Its principal assets were 695 residential lots located near Palos Verdes, California. The lots had been held by the corporation for many years,[4] and had a tax basis in excess of $430,000. Their market value, as determined by sale of the lots in December, 1943, and January, 1944, was approximately $25,000.

American Pipe acquired the Palos Verdes stock through a nominee, one Robert P. Archer, employed by American Pipe ostensibly as an accountant and expediter for Government contracts. American Pipe advanced funds to Archer, who began purchasing Palos Verdes shares in 1943. Many outstanding shares were acquired through

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[3] Wilmington Trust Co. v. Helvering, 1942, 316 U.S. 164; Gensinger v. Commissioner, 9 Cir., 1953, 208 F.2d 576; Grace Bros., Inc. v. Commissioner, 9 Cir., 1949, 173 F.2d 170.

[4] The lots had been transferred by tax deeds to the State of California in 1938. A decree issuing from an action instituted by Palos Verdes in 1943 allowed redemption of the lots upon payment of delinquent taxes within six months. Most of the lots were redeemed.

a general offer of $2 per share, although Archer himself testified that the shares had been selling between 25 and 45 cents per share on the market. After acquiring a controlling interest in Palos Verdes, the remaining shareholders were forced out by a large assessment.

On December 2, 1943, Archer, who took legal title to the Palos Verdes shares, relinquished them to American Pipe upon cancellation of his indebtedness for the funds advanced to purchase the shares. Immediately, the fiscal year of Palos Verdes was changed to coincide with the calendar year of American Pipe. Less than three weeks later, on December 23, 1943, a liquidation sale of the Palos Verdes lots was held. 451 of the lots were sold to one Carl H. Dahlberg for his personal note for $18,000.[5] The tax loss from this sale amounted to $232,781.00. On January 15 and 16, 1944, most of the remaining lots netted $16,185.00 at a public auction, resulting in tax losses of $167,612.91.

Thus, for a total cost of $11,248.96 to American Pipe, it acquired tax losses of $400,393.91. American Pipe caused Palos Verdes to file a consolidated return for the period December 3, 1943, to December 31, 1943, and for the years thereafter. The resulting offset of American Pipe's gains with Palos Verdes losses, and carryovers of net operating losses, is dramatically displayed in the following table and explanation taken from the Tax Court's findings of fact:

Taxable Year	American Pipe Net Income, or (Loss)	Palos Verdes Net Income, or (Loss)	Consolidated Net Income, or (Loss)
1943	$ 16,880.52	($245,800.74)	($228,920.22)
1944	96,515.44	(419,329.90)	(322,814.46)
1945	144,909.04	(272,164.94)	(127,255.90)
1946	316,644.17	(148,632.80)	(168,011.37)

[5] Dahlberg, now a vice-president of American Pipe, reconveyed the lots to the president of American Pipe in 1948 in extinguishment of his debt to American Pipe for funds advanced to pay back taxes due on the lots. Thus, it appears the sale to Dahlberg was a mere sham, designed to accomplish a quick sale of the lots to gain the tax benefits.

"The amounts stated in the Palos Verdes column and in the Consolidated column for the taxable year 1944, reflect a carry-over of claimed net operating loss of Palos Verdes for the period December 3, 1943, to December 31, 1943, deducted on the consolidated return filed for the year 1944 in the amount of $215,639.88. The amounts stated in the Palos Verdes column and in the Consolidated column for 1945 and 1946 reflect carry-overs of claimed net operating losses for the first and second preceding years of Palos Verdes deducted on the consolidated returns filed for 1945 and 1946, in the amounts of $322,814.46 and $107,174.58, respectively."

Petitioner argues that the acquisition of Palos Verdes was motivated by the business purposes recited in a letter from Jack Lane, president of American Pipe, to his stockholders, proposing acquisition of Palos Verdes. The letter listed the advantages of said acquisition as giving American Pipe a corporation operating in the real estate field to improve its position in the sale of pipe and casing in real estate developments, and providing an organization for the marketing of postwar metal houses to be constructed by American Pipe.

A close scrutiny of the reasons for the purchase of Palos Verdes reveals that any corporation formed to do business in the real estate field would have satisfied the alleged needs of American Pipe. The reasons advanced by petitioner that its acquisition of a practically defunct corporation was the potential value of the lots does not overshadow the conclusion that the acquisition was for a huge potential tax benefit. The fact that within two months of acquisition Palos Verdes was a mere corporate shell is highly significant as militating against petitioner's contention of his non-tax motivation.

The findings of the Tax Court are supported by substantial evidence and its decision is therefore affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15174

AMERICAN PIPE & STEEL CORPORATION, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Judgment

Upon Petition to Review a decision of the Tax Court of the United States.

This cause came on to be heard on the Transcript of the Record from the Tax Court of the United States and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the decision of the said Tax Court of the United States in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered April 17, 1957
PAUL P. O'BRIEN, Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, June 4, 1957

Before: ORR, FEE and BARNES, Circuit Judges.

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of petitioner, filed May 16, 1957, and within time allowed therefor by rule of Court,

for a rehearing and rehearing en banc of the above entitled cause be, and hereby is denied.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957

AMERICAN PIPE & STEEL CORPORATION, *Petitioner*,

VS.

COMMISSIONER OF INTERNAL REVENUE

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 1, 1957.

(SGD) HUGO L. BLACK
Associate Justice of the Supreme Court of the United States

Dated this 29th day of August, 1957.